

SCHLAM STONE & DOLAN LLP

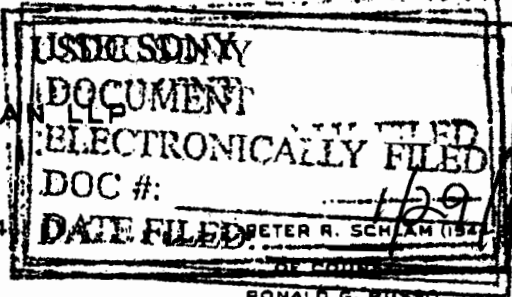
26 BROADWAY

NEW YORK, N.Y. 10004

(212) 344-5400

TELECOPIER: (212) 344-7677

www.schlamstone.com



HARVEY M. STONE
 RICHARD H. DOLAN
 WAYNE I. BADEN
 JAMES C. SHERWOOD
 THOMAS A. KISSANE
 BENNETTE D. KRAMER
 JEFFREY M. EILENDER
 JOHN M. LUNDIN
 JONATHAN MAZER

RONALD G. RUSSO
 MARY W. ANDERSON
 DAVID J. KATZ
 ERIK S. GROOTHUIS
 HILLARY S. ZILZ
 NIAL D. O'MURCHADHA
 ANDREW S. HARRIS
 SAMUEL L. BUTT

MEMO ENDORSED

January 28, 2009

VIA TELECOPIER: (212) 805-4258
AND HAND DELIVERY (with enclosure)

Honorable Debra Freeman
 United States Magistrate Judge
 United States District Court
 Southern District of New York
 500 Pearl Street
 New York, New York 10007

SO ORDERED: DATE: 1/29/09

 DEBRA FREEMAN
 UNITED STATES MAGISTRATE JUDGE

Re: *Lavandeira v. Infuse LLC, et al.*
Case No.: 08 CV 11213 (JSR) (DCF)

Dear Judge Freeman:

This firm represents the Plaintiff in the above-referenced action and Defendants in *Silver v. Lavandeira*, 08-CV-6522 (JSR)(DCF). I write to request that February 9, 2009 be set as the date by which Plaintiff in the above-referenced action must move to dismiss or otherwise respond to Defendant Elizabeth Silver's Counterclaims. *mailed*

I make this request to avoid any confusion as to when our motion is due and to avoid any potential prejudice that may arise out of the delay between the filing date of Defendant Silver's Answer, Affirmative Defenses and Counterclaims, January 12, 2009, and service upon us, which was accomplished via facsimile on January 17, 2009, albeit with a page missing that was not received from Ms. Silver until January 21, 2009. (Exhibit 1, Defendant Silver's Answer, Affirmative Defenses, and Counterclaims, with facsimile transmission date headings of January 17, 2009 and January 21, 2009).¹ We have requested that Ms. Silver stipulate to this date, but have received no response.

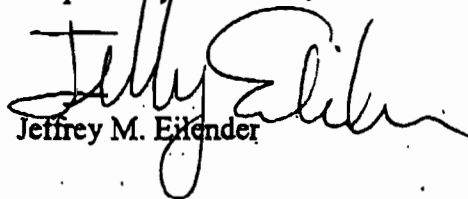
¹ Although Ms. Silver attached an affidavit of service stating she mailed the Answer on January 12, 2009, (Exhibit 1 at 24), the mailing has not been received to date. As set forth at length in my letter of January 23, 2009 to Your

Honorable Debra Freeman
United States Magistrate Judge
United States District Court
Southern District of New York
January 28, 2009
Page 2 of 2

Assuming that service was properly effected via facsimile on January 17, 2009, even though a page was missing, February 9, 2009, is the date our response to Ms. Silver's Counterclaims would be due pursuant to Federal Rules of Civil Procedure.² Rule 12(a)(1)(B) provides that a party must serve an answer to a counterclaim within 20 days after being served. Rule 6(d) provides that the time at which a party may or must act is extended by three days when, as here, service is made by electronic means, pursuant to Rule 5(b)(2)(E). February 9, 2009 is twenty-three days from January 17, non-inclusive of the date of service.

Finally, as requested in my January 23, 2009 letter to Your Honor, to avoid the further confusion and prejudice of the sort that Ms. Silver's haphazard service causes,³ it is respectfully requested that Ms. Silver be ordered to serve both this firm, attention Samuel Butt, and co-counsel at Freedman and Taitelman LLP by overnight Federal Express or certified mail, sent the same day as any filing, to ensure we receive all filings in a timely manner.

Respectfully submitted,



Jeffrey M. Ellender

JME/gc
Encl.

cc: (via e-mail with enclosures)
Elizabeth Silver

Honor, this is but one instance of Ms. Silver failing to properly serve us in an attempt to impede, delay, confuse, and prejudice our ability to respond.

² Although my letter to Your Honor of January 23, 2009 stated we planned to move to dismiss Ms. Silver Counterclaims by February 6, 2009, this calculation neglected to include the extension of three days granted by FRCP 6(d) for service by electronic means.

³ It should be noted that January 17th, 2009 was a Saturday, and the Saturday preceding the Dr. Martin Luther King, Jr. holiday, indicating that Ms. Silver was well aware we would likely not receive this facsimile service until January 20th, 2009.